customers in that market. 25/ In addition, there is no question that lower, more cost-based loops rates are important. Nevertheless, SBC/Ameritech's "discounted" loop offering cannot lawfully be adopted as a merger condition until the restrictions on its availability are removed.

Specifically, loops purchased at the "discounted" price could not be purchased or used in combination with SBC/Ameritech local switching or the functions or features associated with that switching. 26/ In addition, the proposed "discounted" loop offer would be available (1) *only* for residential customers, (2) *only* for non-advanced services; (3) *only* for a certain number of loops, and (4) *only* for two years or less beginning 30 days after the Merger Closing Date. 27/ Once purchased, moreover, a carrier would be able to lease the offered loops at the discounted price for only three years or until the carrier stopped using a given loop, whichever is shorter. 28/

Making the "discounted" loop offering available only to serve residential customers and only to provide non-advanced services violates the nondiscrimination requirements of Section 251(c)(3) 29/ for the same reasons as

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25/ See Report on the State of Local Competition, Submitted by CompTel to the Honorable Tom Bliley, Jr., Chairman, U.S. House of Representatives, Committee on Commerce, Dec. 9, 1998 (indicating that 71 percent of CompTel member survey respondents are providing service to residential customers in at least one state).

26/ Proposed Conditions at 24-25.

27/ Proposed Conditions at 24-25.

28/ Id. at 24.

29/ 47 U.S.C. § 251(c)(3).

those discussed above with respect to network elements in their combined form. First, these restrictions discriminate against carriers that choose to exercise their statutory rights to serve other types of customers over a loop and to provide other types of services over a loop. Second, these restrictions discriminate against all CLECs vis-à-vis SBC and Ameritech because, contrary to their competitors, SBC and Ameritech can obtain access to loops at cost based rates no matter what services they choose to provide over those loops and no matter what customers they choose to serve over those loops. Third, by making lower cost loops available only to serve a certain class of customers, SBC and Ameritech would be discriminating based on the identity of the end user served by a CLEC -- another violation of Section 251(c)(3).

The discounts on loop rates also violate the cost-based pricing provisions of Section 252(d)(1). If the discounted loop rates are "cost-based," then by definition the regular loop rates are above cost. SBC/Ameritech cannot offer two different rates for loops and contend that both rates are "cost-based."

Furthermore, SBC's and Ameritech's promise to make residential loops available to competitors at an average 25 percent discount determined across all geographic regions in the SBC/Ameritech states 30/ is, as a practical matter, meaningless. This is so because promising an "average" 25 percent discount based on all geographic regions in the entire SBC/Ameritech footprint gives SBC/Ameritech the latitude to offer very limited discounts in the most accessible or

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30/ Proposed Conditions at 24.

most desirable central offices while offering higher discounts only in the less accessible or less desirable central offices.

For all of these same reasons, the SBC/Ameritech discounts on resale of residential services are unlawful and violative of the Section 251(d) pricing principles. Neither the discounted loop rates, nor the resale discounts, are lawful or effective conditions.

D. The Proposed "Compliance with the FCC's Pricing Rules" Condition Is No More Than an Agreement to Comply with Existing Requirements.

SBC and Ameritech state in the proposed "Compliance with FCC UNE Pricing Rules" that they will comply with the Commission's UNE pricing rules and resolve any concerns the Commission might have regarding such compliance. 31/ What SBC and Ameritech do not appear to understand, however, is that they must comply with the Commission's pricing rules regardless of whether they *agree* to do so or not. The Supreme Court made this clear in AT&T Corp. v. Iowa Utilities Board. 32/ Unless SBC and Ameritech somehow view such compliance with these binding FCC rules as optional, it is not clear why a condition requiring compliance with the Commission's UNE pricing rules is necessary.

31/ Id. at 23.

32/ AT&T Corp., 119 S.Ct. at 729, 730, 733.

E. The Proposed "Shared Transport" Commitments Offer Nothing More Than Compliance With FCC Regulations.

SBC's and Ameritech's proposal to offer shared transport in Ameritech region states similarly offers nothing more than compliance with the Commission's regulations. First, SBC and Ameritech indicate that they will *not* abide by this condition if the Commission issues even a geographically-limited "final and non-appealable order" under Section 251(d)(2) that either local switching or transport is not a UNE that must be made available to competitors. 33/

Second, if the Commission does decide that SBC and Ameritech must provide competitors with switching and shared transport -- as is likely since both switching and shared transport readily satisfy any reasonable reading of the "necessary" and "impair" standards in Section 251(d)(2) -- SBC and Ameritech would be agreeing in this condition to do no more than what they would already be required to do.

Third, SBC's and Ameritech's agreement to provide competitors with shared transport in Ameritech states does little in itself to help competitors. This is so because the OSS in Ameritech states is inadequate to permit the use of network elements by competitors at costs and speeds, and with a level of quality comparable to that of SBC and Ameritech. In addition, the OSS available in Ameritech states

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33/ 47 U.S.C. § 251(d)(2); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, FCC 99-70, CC Docket No. 96-98, (rel. April 16, 1999).

does not permit the provision of telecommunications services at commercial volumes using shared transport or other UNEs.

At best, therefore, the SBC/Ameritech "shared transport" condition would simply obligate SBC and Ameritech to do what they would already be required to do -- and to do so with the same inadequate OSS that they offer today.

III. THE PROPOSED CONDITIONS CONTEMPLATE A WEAK SEPARATE AFFILIATE STRUCTURE THAT WOULD PERMIT SUBSTANTIAL JOINT ACTIVITY, SHARING, AND CROSS-SUBSIDIZATION.

A. The Proposed Advanced Services Separate Affiliate Structure Provides Few Benefits.

SBC and Ameritech propose as a "condition" that they be permitted to provide advanced services through one or more separate subsidiaries structured according to the provisions of Section 272. 34/ In addition, their proposal would: (1) allow SBC/Ameritech and its advanced services affiliates to jointly market their services, (2) permit SBC/Ameritech to transfer to its affiliates customers identified through inbound or outbound marketing, (3) permit SBC/Ameritech to provide operations, installation, and maintenance services to its affiliates, (4) allow the affiliates to own their own facilities, (5) allow the affiliates to use SBC/Ameritech's brand name, trademarks, and service marks on an exclusive basis, (6) permit the employees of the affiliates to be located within the same buildings and on the same

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34/ 47 U.S.C. § 272; Proposed Conditions at 14-18.

floors as SBC/Ameritech's employees, (7) permit SBC/Ameritech to transfer equipment to its affiliates on an exclusive basis, and (8) transfer its advanced services customers to the affiliate. 35/ Furthermore, this SBC/Ameritech proposal would permit the intermingling of equipment, customers, brand names, services, employees, and resources between SBC/Ameritech and its affiliates without causing its affiliates to be deemed successors or assigns of an RBOC under Section 153(4)(A) of the 1996 Act. 36/

SBC and Ameritech also propose as a "condition" on their merger that they be "required" to adopt a "National-Local Strategy" under which CLEC affiliates of SBC/Ameritech would effectively leverage the market power that SBC and Ameritech would gain from their merger in order to enter out-of-region local exchange markets. 37/ Although SBC and Ameritech do not appear to discuss the structural separation of these CLEC affiliates in their proposal, these affiliates presumably would be subject -- at most -- to the same permissive structural separation as that proposed for the advanced services affiliates.

The relationships permitted between SBC/Ameritech and its "separate" affiliate show that these two entities are virtually the same because of the wide range of permissible joint and shared activities just described. These

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35/ Id. at 15, 16, 17, 18.

36/ Id. at 16; 47 U.S.C. § 153(4)(A).

37/ Proposed Conditions at 31-33.

affiliates are nothing more than alter egos of the ILEC. This structure, therefore, should not be incorporated in its present formulation as a condition on the merger.

CompTel has argued from the beginning of the Commission's Advanced Services Proceeding 38/ and in its Section 251(h) Petition, 39/ that Section 272-based structural separations like that proposed for SBC/Ameritech's proposed advanced services and CLEC affiliates are inadequate to address an ILEC's ability and incentive to discriminate in favor of such affiliates. 40/ An ILEC's inherent conflict of interest as both the owner of the local exchange network and as a competitor in the local exchange market requires the imposition of more stringent structural safeguards designed to mitigate this conflict of interest and thus minimize the ILEC's incentive and ability to discriminate. Section 272-based structural separations also are inadequate to prevent an ILEC from attempting to avoid its obligations under the 1996 Act by moving facilities or services into an affiliate.

38/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, FCC 98-188, CC Docket No. 98-147 (rel. Aug. 7, 1998), Comments of the Competitive Telecommunications Association (filed Sep. 25, 1998) ("CompTel Advanced Services Comments").

39/ Petition for Declaratory Ruling or, in the Alternative, for Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers under Section 251(h) of the Communications Act submitted by the Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association, CC Docket No. 98-39 (filed March 23, 1998) ("CompTel 251(h) Petition").

40/ CompTel Advanced Services Comments at 9-14, 14-16, 19-35; CompTel Section 251(h) Petition.

B. The Proposed Conditions Risk Prejudgment of the Section 251(h) Issue.

The proposed conditions appear to have an ulterior motive from SBC/Ameritech's point of view: the conditions provide that the affiliate would not be deemed a "successor or assign" within the statutory definition of a Bell operating company. 41/ If the words "successor or assign" in Section 4(a) of the Act were read in the same manner as those words in Section 251(h) of the Act, this condition could be setting the stage for a conclusion that this weak separate affiliate would not be considered an incumbent local exchange carrier within the meaning of Section 251(c) of the Act, and that it would therefore be exempt from the unbundling, resale, and other market-opening provisions of the Act. Such a provision could be read, however unintended it might be on the part of the Commission, to prejudge issues that are squarely before the Commission in other proceedings -- namely the Advanced Services Separate Affiliate proceeding and the CompTel 251(h) declaratory ruling proceeding. 42/

To create a truly separate affiliate that would not constitute a "successor or assign" of SBC/Ameritech, SBC/Ameritech must adopt far more

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41/ Proposed Conditions at ¶ 28.

42/ Under Section 251(h)(1), 47 U.S.C. § 251(h)(1), an affiliate that receives benefits from its ILEC parent, whether through a transfer of assets or other benefits, qualifies as a "successor or assign" of the ILEC. See CompTel Section 251(h) Petition at 8-13. Alternatively, such affiliates qualify, under Section 251(h)(2), 47 U.S.C. § 251(h)(2). as "comparable carriers" subject to ILEC regulation. Id. at 13-15. In either case, an ILEC, such as SBC/Ameritech, cannot be permitted to avoid its obligations under the 1996 Act by moving services or facilities into a separate affiliate. Id. at 3-7.

stringent separation requirements. To make the proposed advanced services and CLEC separate affiliates truly separate from, and independent of, SBC/Ameritech, and thus to both minimize SBC/Ameritech's ability and incentive to discriminate in their favor and prevent SBC/Ameritech from attempting to avoid its obligations under the Act by moving facilities or services into the affiliates, the Commission would need to require SBC/Ameritech to implement additional structural safeguards. As CompTel set forth in its comments in the Advanced Services Separate Affiliate Proceeding, these safeguards should include: (1) substantial public ownership of the affiliates and the presence of independent directors on the boards of the affiliates; (2) a ban on joint marketing by SBC/Ameritech and its affiliates; (3) a ban on the joint ownership or sharing of network facilities, functions, services, or employees by SBC/Ameritech and its affiliates; and (4) a requirement that any transfer of assets, including customer accounts, equipment, employees, or brand names, should subject the affiliate to ILEC obligations. 43/

C. Additional Structural Safeguards Should Be Imposed On SBC/Ameritech.

In addition, it is critical that the conditions imposed by the Commission include (1) a ban on the bundling of the affiliates' services with SBC/Ameritech's services (if NatLoCo does not operate within the ILEC region), (2) a ban on the affiliates' resale of SBC/Ameritech's local exchange services (if NatLoCo does operate within the ILEC region), and (3) a requirement that the

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43/ CompTel Advanced Services Comments at ii-iii, 22-35.

affiliates may buy from SBC/Ameritech *only* those services and facilities that are available to all other CLECs and priced at cost-based rates -- (no matter what). In its ex parte meetings with the Commission and in its presentation at the forum, prior to the filing of the proposed conditions, CompTel urged that these conditions be imposed on this merger. 44/

A ban on the bundling by the affiliates of their services with SBC/Ameritech's services is essential because, if the affiliates engaged in such bundling throughout SBC/Ameritech's vast post-merger footprint, no other carriers would be able to match those offerings.

A ban on the resale of SBC/Ameritech's local exchange service by the advanced services and CLEC affiliates is necessary because service-resale is *inherently* discriminatory and would uniquely favor those affiliates. This is so because wholly-owned affiliates can offer services through resale without running into the financial and market constraints of resale that would otherwise affect a legitimate entrant. First, unlike a true CLEC, the SBC/Ameritech "CLEC" using service resale would continue to receive access revenues for each of the affiliate's customers, acting in effect as uncompensated marketing agent for SBC/Ameritech's access service. Second, the defining constraint of resale is that the CLEC-reseller can only offer services that are identical to those of the ILEC. An ILEC affiliate,

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44/ See Comments of H. Russell Frisby, Jr., President, CompTel, at May 6 Forum; Ex Parte Notice of CompTel in CC Docket No. 98-141, June 7, 1999.

however, could actually benefit from this service limitation, because it would actually *want* customers to perceive it as the ILEC.

A requirement that SBC/Ameritech's affiliates must buy or receive from SBC/Ameritech only those services and facilities that are (1) available to all other CLECs and (2) priced at cost-based rates is necessary because SBC/Ameritech and its affiliates would have the same shareholders, and because SBC and Ameritech have stated that they will ultimately view the economic return from both SBC/Ameritech and their separate affiliates on a consolidated basis.45 This means that while an unaffiliated CLEC would experience real additional costs if it paid above-cost rates for services or facilities from SBC/Ameritech, the costs that an SBC/Ameritech affiliate would incur in paying such above-cost rates would simply become revenues for SBC/Ameritech. Because costs and revenues of both SBC/Ameritech and its affiliates will be consolidated to determine SBC/Ameritech's earnings, such transactions would "net out" with no effect on corporate profits. To prevent SBC/Ameritech from charging above-cost prices to harm competitors, therefore, the prices of any services or facilities that an affiliate obtains from SBC/Ameritech must be cost-based. In addition, to prevent other forms of

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45 SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois, and Ameritech Illinois Metro, Inc., Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company d/b/a/ Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc., in Accordance with Section 7-204 of the Public Utilities Act and for All Other Appropriate Relief, Illinois Commerce Commission, Docket No. 98-0555, SBC-Ameritech Exhibit 1.3, Direct Testimony on Re-Opening of James Kahan, at 20 (filed June 16, 1999) ("Kahan Illinois Testimony").

discrimination, the services and facilities made available by SBC/Ameritech to its affiliates must be available on identical terms and conditions (including ordering and provisioning using the same OSS) to unaffiliated CLECs. 46/

Without these three safeguards, SBC/Ameritech could crowd out legitimate competitors and intensify its dominance of its local exchange markets.

D. Whatever Benefits Might Flow From The Proposed Separate Affiliate Structure Would be Lost Due The Availability Of Service Resale And The Exclusive Nature Of The DSL Line-Sharing Proposal.

Even a weak separate affiliate structure such as the one proposed here arguably could produce some benefits. For example, if the separate affiliate were required to use the same OSS as unaffiliated CLECs to order UNEs, were forced to employ the same collocation arrangements, and were required to "stand in the same line" for collocation space as unaffiliated CLECs, then the ILEC part of SBC/Ameritech might have stronger incentives to make OSS work, to make collocation viable, and to open its central office space to competitors. These

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46/ There is no indication from the proposed conditions that SBC/Ameritech would treat its advanced services affiliate as if it were a CLEC as opposed to another part of the same company. Indeed, from Ameritech's testimony in the Illinois state proceeding examining the SBC/Ameritech merger, it appears that SBC/Ameritech would not treat an advanced services affiliate just like an unaffiliated CLEC, but rather would use such measures as the FCC's affiliate transaction rules to govern the prices paid for services rendered by the ILEC entity to the advanced services separate affiliate. In that proceeding, an Ameritech witness stated that ". . . all such dealings between Ameritech Illinois and the National Local Subsidiary will be controlled by federal and state affiliate transaction rules, and will be subject to review by the Commission." Illinois Kahan Testimony at 21.

benefits, however, are unlikely to be achieved under the currently proposed conditions.

As a practical matter, it is unlikely that the SBC/Ameritech advanced services separate affiliate (or any other "CLEC" affiliate) will need to deal with SBC/Ameritech in the same way that an unaffiliated CLEC must. First, SBC/Ameritech's advanced services affiliate does not need to provide advanced services such as xDSL in the same way as an unaffiliated CLEC. Either the advanced services affiliate can resell the ILEC entity's own advanced services, or it can engage in line-sharing with SBC/Ameritech's ILEC entity on an exclusive basis. 47/ The SBC/Ameritech separate affiliate thus need not order loops in the same manner as competitors or install facilities in SBC/Ameritech central offices in the same manner that CLECs must do to provide competing advanced services such as xDSL.

Second, the SBC/Ameritech advanced services affiliate will likely be packaging its advanced services offerings with other services, including local exchange services, where it has the unique ability to engage in joint marketing or service resale relationships with the SBC/Ameritech local entity. As discussed

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47/ As discussed above, it is unclear from the proposed conditions exactly what the advanced services separate affiliate *is* supposed to do, as opposed to what the ILEC entity will be doing *for and with* the separate affiliate. At most, however, the conditions would appear to contemplate an advanced services affiliate that could (and likely would) provide advanced services via resale of the ILEC's services, via the exclusive DSL line sharing arrangement, or via some other arrangement likely to differ substantially from the type of arrangement an unaffiliated CLEC would have with the SBC/Ameritech.

above, only an SBC/Ameritech "CLEC" affiliate could find it profitable to engage in resale of local exchange services; and joint marketing arrangements are by the terms of the proposed conditions exempted from the nondiscrimination requirements. Thus, the SBC/Ameritech advanced services separate affiliate is unlikely to interface with SBC/Ameritech in any way that resembles the way that unaffiliated carriers will do, whether for advanced services and for packages of advanced and other local services -- even if advanced services line-sharing is eventually made available to competitors.

In sum, then, even the few benefits that arguably could occur in the context of the proposed separate affiliate structure -- in terms of creating better and nondiscriminatory conditions for competitors -- are unlikely to materialize. The Commission should strengthen the separate affiliate requirements as discussed above as a condition of the merger in order to achieve these procompetitive benefits.

IV. OTHER PROPOSED CONDITIONS MOVE IN THE RIGHT DIRECTION BUT REMAIN INADEQUATE .

Other conditions proposed by SBC/Ameritech move in the right direction but are inadequate to have any real impact or balancing effect on the likely competitive and consumer harms of the proposed merger. These conditions would require modification before they could have any real significance.

A. The Proposed "Line Sharing" Condition Takes a Positive Step but is Too Restricted and Discriminatory to be Lawful or of any Value as a Merger Condition.

SBC and Ameritech take a theoretically positive step in proposing to offer line sharing as described in the Further Notice of Proposed Rulemaking in the Advanced Services Proceeding, CC Docket No. 98-147. 48/ SBC and Ameritech effectively eliminate the value of this proposal, however, by imposing broad limitations on its applicability and by creating a discriminatory exception to those limitations for the proposed SBC/Ameritech advanced services affiliates. SBC/Ameritech's promise to provide line-sharing opportunities for advanced services competitors is so hedged that competitors are unlikely to see that offering materialize soon, if ever -- and in the meantime, SBC/Ameritech's affiliate benefits from the discriminatory availability of an exclusive line-sharing offering from SBC/Ameritech.

SBC and Ameritech severely limit the applicability of the proposed line sharing condition by stating that they will offer the proposed line sharing only when SBC and Ameritech decide (1) that line sharing has become technically feasible and (2) that the equipment necessary to provide line sharing has become available, based on industry standards, and at commercial volumes. 49/

The problems with these limitations are, first, that they appear to give SBC and Ameritech unilateral discretion in deciding when the prerequisites for the

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48/ Proposed Conditions at 19.

49/ Id.

line sharing condition are met. Second, SBC and Ameritech appear to believe that line-sharing is not technically feasible. They have both argued in their comments opposing line sharing in CC Docket No. 98-147 that line sharing is not technically feasible and that the equipment necessary to provide line sharing is not available. 50/ Their comments in that docket indicate, moreover, that absent an order that ILECs must provide line sharing, neither SBC nor Ameritech will work to make line sharing technically feasible or to make the equipment necessary for line sharing available. 51/

In addition, Ameritech has stated that even if the Commission were to order the provision of line sharing, it would "take a minimum of two years for [Ameritech] to complete -- after industry standards and regulatory requirements were fully developed" -- the work required to implement line sharing. 52/ SBC has made similar statements. 53/ Thus, the statements of SBC and Ameritech in other

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50/ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Further Notice of Proposed Rulemaking, **FCC** _____, CC Docket No. 98-147 (rel. March 31, 1999), Comments of Ameritech (filed June 15, 1999) ("Ameritech Line Sharing Comments"), at 8-12, and Comments of SBC Communications Inc. (filed June 15, 1999) ("SBC Line Sharing Comments"), at 20-27.

51/ See Ameritech Line Sharing Comments at 8-12; SBC Line Sharing Comments at 20-27.

52/ Ameritech Line Sharing Comments at 8-9.

53/ SBC Line Sharing Comments at 21 (SBC estimates that the process of developing and implementing the upgrades necessary to implement line sharing "could take approximately one and a half to two years to complete.").

proceedings reveal that these ILECs are not likely to actually offer line sharing under the proposed condition for two or more years to come, at best.

SBC and Ameritech also have the audacity to create an unlawful exception to the limitations on the line sharing condition for their advanced services affiliates but not for unaffiliated CLECs. Specifically, SBC and Ameritech state that even if they did not provide line sharing to unaffiliated CLECs under the proposed condition, they could provide line sharing to their own advanced services affiliates. 54/ They also state that they would do so at a 50 percent "discount" off the lowest monthly recurring charge for the loops used. 55/

The discounted "surrogate line sharing" unbundled loop rate for competitors does little to mitigate this competitive harm, since that rate is only available if the affiliate uses line-sharing (which it may not, since it can profitably employ resale), and it still requires the end user customer to purchase two lines in order to obtain competitive DSL services from a CLEC (but not if it obtains them from SBC/Ameritech). 56/

54/ Proposed Conditions at 19.

55/ Id.

56/ SBC and Ameritech state that if they provided such line sharing to their affiliates, they would permit unaffiliated CLECs to purchase unbundled local loops at a similar 50 percent "discount" off the lowest recurring monthly charge, but only if (1) such unaffiliated CLECs did not use the loop to provide any voice grade service, (2) SBC and Ameritech provided the local exchange service to the end users on those loops, and (3) the unaffiliated CLECs' advanced services were compatible with SBC's and Ameritech's voice grade services. Id. at 19-20.

In sum, therefore, SBC's and Ameritech's line sharing proposal would have no value as a merger condition -- and could not lawfully be adopted as a merger condition -- unless the Commission requires SBC and Ameritech to remove the prerequisites to its applicability, remove the control that SBC/Ameritech could exercise over its applicability, and either remove the discriminatory exception that SBC and Ameritech make for their advanced services affiliates or offer the same unrestricted exception to unaffiliated CLECs.

B. The Uniform OSS Proposal and OSS Assistance for Small CLEC Proposal Take the Right Approach but Require Modifications.

SBC and Ameritech also propose to (1) develop and deploy uniform OSS throughout the SBC/Ameritech region -- except for Connecticut -- and (2) make teams of experts available to assist certain small CLECs that experience problems with SBC/Ameritech's OSS. While SBC and Ameritech have taken the right approach in proposing these commitments, modifications would be required in order to make them effective.

First, the Commission should require SBC/Ameritech not only to implement uniform OSS throughout the SBC/Ameritech region, but also to adopt as that uniform OSS, the OSS required in Texas. This requirement is essential because CLECs will have to deploy interfaces compatible with the OSS that is deployed by SBC/Ameritech. Since the OSS required in Texas will use the most recently developed interface standards, it would make no sense from an efficiency or

quality of service standpoint to require CLECs to design their interfaces based on anything other than the standards required in Texas.

Second, in offering OSS assistance to small CLECs, SBC and Ameritech stated that the term "small CLEC" would mean any CLEC that, when combined with all of its parents, subsidiaries, and joint ventures providing telecommunications services, has less than $300,000 million in annual telecommunications revenues, excluding revenues from wireless services. 57/ This revenue cut-off amount, however, is so low that it would exclude many of CompTel's members who are small CLECs. To be of any real assistance to small CLECs, the cut-off revenue amount for the promised OSS assistance should be at least $500 million in annual telecommunications revenues. Many telecommunications companies that are small CLECs have substantial revenues from their other telecommunications activities, revenues that may well exceed the proposed $200 million figure. Yet these companies are often still small in terms of their activity in providing local services, where they are a new entrant. The Commission should modify this condition to address the needs of the true range of small carriers by raising the annual telecommunications revenues figure to $500 million.

C. The Promise to Install CLEC-Accessible Cabling in Multi-Unit Properties is a Positive but Inadequate Step.

SBC and Ameritech take a potentially positive step in promising to install and provide cables that will give CLECs a single point of interface for newly

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57/ Proposed Conditions at 12.

constructed or retrofitted single building multi-dwelling units ("MDUs") and multi-tenant business premises where SBC/Ameritech is hired to install new cables or where SBC/Ameritech owns or controls the cables. 58/ As with its other proposed commitments, however, its offer is significantly limited. By restricting its commitment to *newly* constructed or retrofitted single building MDUs and multi-tenant business premises, SBC and Ameritech severely limit the potential benefits of this commitment. Newly constructed and retrofitted single building MDUs and multi-tenant business premises are only the tip of the iceberg. This condition would do nothing to address the inability of CLECs to access the substantial numbers of existing multi-unit residential and office buildings not slated for retrofitting. SBC/Ameritech's willingness to provide standard interfaces also expires, inexplicably, after three years. This makes the offering close to useless as a practical matter.

It is also a theoretically positive step that SBC and Ameritech have committed to conduct trials for offering access to cabling within MDUs and multi-tenant premises. The trials are extremely limited, however, in both scope (an unspecified number of buildings in only five cities) and coverage (only MDUs and buildings housing "small businesses"). A serious commitment to opening up access to these buildings would require a much more extensive trial than is reflected in the

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58/ Proposed Conditions at 30. We assume that this must mean something more than merely complying with existing requirements to establish a minimum point of entry ("MPOE"), although this is not clear from the proposed conditions.

proposed condition. No commitments flow, moreover, from the outcome of those trials (other than a commitment to "negotiate").

In sum, this proposed condition offers too little to be meaningfully to the promotion of competition in multi-tenant buildings.

D. The "MFN Arrangements" Condition Reflects a Constructive Concept But Is Too Restricted to Have Any Impact.

Although simplifying the request/arbitration process and making additional interconnection arrangements and UNEs available to competitors is a constructive concept, neither the out-of-region nor the in-region portions of the proposed "MFN Arrangements" condition would have any meaningful benefit for competition or consumers.

Out-of-Region: Under the out-of-region portion of this condition, SBC and Ameritech promise to offer competitors in the SBC/Ameritech region any interconnection arrangement or UNE that has never before been made available to a competitor by the pertinent ILEC on the same terms and conditions (excluding price) that an SBC/Ameritech CLEC affiliate obtains through arbitration outside the SBC/Ameritech region. 59/ This commitment, however, is unlikely to bring any benefits to competitors and have no impact on competition because it is restricted to (1) interconnection agreements and UNEs that an out-of-region ILEC has *never before* made available to *any other CLEC* and (2) interconnection arrangements and UNEs obtained through *arbitration*. The likelihood is that SBC/Ameritech will

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59/ Id. at 28.

negotiate a favorable arrangement with another ILEC, not that it will be more successful in an arbitration than countless other CLECs have been -- and under the proposed conditions, such a term would not be available to in-region CLECs.

In-Region: Under the in-region portion of this condition, SBC and Ameritech agree to make available to competitors in any SBC/Ameritech state any interconnection arrangement or UNE on the same terms and conditions (excluding price) that SBC or any SBC affiliate voluntarily-negotiates in an agreement that is approved after the Merger Closing Date in any other SBC/Ameritech state. 60/ This commitment also would have no beneficial effect on competitors or consumers because it is restricted to interconnection arrangements and UNEs that are: (1) *voluntarily* negotiated (2) by SBC or an SBC subsidiary (which appears to mean the ILEC forms of SBC and its subsidiaries, not any of its CLEC affiliates), and (3) *after* the Merger Closing Date. These limitations make this condition meaningless as a practical matter.

Both the out-of-region and in-region portions of this condition essentially leave CLECs in the same position as they started – relying on SBC's management (and its decisions as to whether its ILEC entities will agree to an item or whether its CLEC entities will arbitrate for an item) as the entity with the power to determine the opportunities available to CLECs. To obtain anything else under these proposals would require a CLEC to pursue arbitration, which negates the

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60/ Id. SBC and Ameritech agree to make such interconnection arrangements and UNEs available under the rules that would apply to Section 252(i) requests. Id.

very point of a commitment that should be designed to expedite the importation of provisions favorable to competition.

In short, the "MFN Arrangements" condition, as currently proposed, would create no improvement in competitive conditions, no simplification of the request/arbitration process, and no real change in SBC/Ameritech's incentive to balance its out-of-region entry with an opening of its in-region local networks. For this condition to have any positive effect, SBC and Ameritech would have to remove the restrictions they have placed on its operation.

IV. THE PROPOSED PERFORMANCE INCENTIVE PLAN IS INADEQUATE AND WOULD NOT ENSURE COMPLIANCE WITH THE 1996 ACT.

As CompTel has made clear in recent filings before the Commission, 61/ CompTel supports the adoption of performance measures and remedies for ILECs that will (1) create ILEC incentives to comply with their market-opening obligations under the 1996 Act and (2) provide adequate compensation to CLECs adversely affected by an ILEC's noncompliance. The "Federal Performance Parity Plan" ("Plan") proposed by SBC and Ameritech, 62/ ¶¶ however, does not create remedies sufficient to create such incentives or provide

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61/ Letter from Robert J. Aamoth and Edward A. Yorkgitis to Michael Pryor, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission (dated June 4, 1999), ex parte submission in CC Docket Nos. 96-98 and 98-121.

62/ Proposed Conditions at 1-2 and Attachment A at 1-5.

such compensation, and does not always require the payment of remedies to affected CLECs. 63/

As an initial matter, the SBC/Ameritech Plan suffers from one fundamental -- and fatal -- defect. The purpose of performance standards and remedies is to ensure that ILECs, like SBC and Ameritech, comply with their obligations under the 1996 Act. Specifically, performance standards and remedies are designed to ensure that ILECs are providing competitors with access to interconnection arrangements, UNEs, and services for resale that is equal in quality to the access the ILEC provides to itself and its affiliates. 64/ Remarkably, however, SBC and Ameritech state in their "Federal Performance *Parity* Plan," that

> [t]he measurements and benchmarks under the Plan *bear no relationship* to the standard of performance that satisfies SBC/Ameritech's legal obligations in a particular state." 65/

The SBC/Ameritech Plan is meaningless unless this basic defect is corrected. To be effective, the performance standards in the Plan must be designed to ensure SBC/Ameritech compliance with the market-opening requirements in the 1996 Act.

63/ CompTel does not address in these comments the adequacy of the performance measures themselves, except to note that those measures must be strong in order to be meaningful. We expect that other parties will identify deficiencies in those measures in their comments. We also assume that the Commission will be addressing performance measures on an industry wide basis, in relevant rulemakings and in Section 271 proceedings.

64/ Local Competition Order, 11 FCC Rcd at 15614-15, 15658-59, ¶¶ 224-25, 313.

65/ Proposed Conditions, Attachment A at 5 (emphasis added).

Assuming such modifications are made, CompTel generally supports a tiered approach to remedies like that set forth in the proposed Plan, 66/ the remedies addressed in any performance incentive plan must generate effective incentives to comply with applicable performance standards both before and after an RBOC like SBC/Ameritech obtains section 271 approval. The remedies also must be sufficient to deter noncompliance both with respect to large CLECs, like AT&T and MCI WorldCom, and small CLECs, such as many of CompTel's members.

The remedies also must compensate CLECs affected by ILEC non-compliance in a manner that goes beyond mere restitution. The full range of damage that noncompliance can cause a CLEC is much greater than the direct cost of the unbundled element involved or of the service not provided (or provided poorly) to the CLEC. An ILEC's non-compliance can cause a CLEC to lose customers, have dissatisfied customers, fail to win customers, lose revenues, and suffer injury to its reputation. Moreover, the effects can be long-term and particularly catastrophic for small CLECs without the financial wherewithal to weather such harm for even short periods of time. The financial remedies proposed by SBC and Ameritech are not sufficient to either deter ILEC non-compliance with performance standards, or adequately compensate CLECs affected by such non-compliance.

66/ Proposed Conditions, Attachment A at 2-4.

The SBC Ameritech proposal that Tier 2 and Tier 3 remedies be paid into a government-created fund, 67/ moreover, severely reduces the deterrent and compensatory effectiveness of their Plan. These remedies would provide far greater incentives for compliance if they were paid directly to the CLECs that used the particular element, service, or function associated with the SBC/Ameritech noncompliance. The Tier 2 and Tier 3 remedies in SBC/Ameritech's Plan are designed to address widespread patterns of discriminatory behavior. As a result, such discriminatory behavior is virtually certain to affect *all CLECs* adversely, even if performance vis-à-vis some CLECs taken individually might not in itself trigger a Tier 1 remedy. Requiring the ILECs to pay Tier 2 and Tier 3 remedies to all CLECs that used an element, service, or function affected by SBC/Ameritech's non-compliance would ensure that such CLECs receive some compensation for the injury they suffer.

In approving an SBC/Ameritech performance incentive plan, the Commission also should consider requiring a sliding scale of additional non-monetary consequences that would apply following a grant of Section 271 authority, and that would address more severe non-compliance with applicable performance standards. In addition, for extreme and deliberate discriminatory behavior, The Commission should consider requiring a structural separation of the network and retail operations of SBC/Ameritech, with safeguards similar to those discussed above with respect to the proposed advanced services affiliates and CLEC affiliates

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67/ Proposed Conditions, Attachment A at 3, 4.

of SBC/Ameritech. In severe cases of noncompliance, structural separation may be the only remedy that will change an ILEC's, such as SBC/Ameritech's, fundamental incentives and behavior. 68/

Although SBC and Ameritech move in the right direction in proposing a performance incentive plan, SBC/Ameritech's Plan would require substantial modifications before it could be effective. Most importantly, the Plan would have to be revised to address and promote compliance with the 1996 Act -- not with some arbitrary level of performance as SBC and Ameritech appear to contemplate -- before it could have any significance.

68/ See discussion in Section III above.

CONCLUSION

For the foregoing reasons, the Commission must substantially improve the proposed conditions if it is to use them as a basis for approval of the SBC/Ameritech merger. The proposed conditions do little to promote competition, and in some cases provide for less than the law requires. They cannot, as drafted, form the basis for grant of the merger application.

Respectfully submitted,

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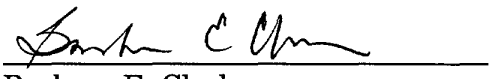
July 19, 1999

CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that on this 19th day of July, 1999, I caused to be served the foregoing Comments of the Competitive Telecommunications Association in CC Docket No. 98-141 on the attached list by hand delivery (where indicated) or first class U. S. Mail.



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